IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

OPTIMER INTERNATIONAL, INC., a Washington corporation, Appellant, v. BELLEVUE, L.L.C., a Delaware limited liability company; SCHROEDER U.S.A. CORP., a Washington corporation; and RODNEY A. SCHROEDER and JANE DOE SCHROEDER, husband and wife, Respondents.	)	No. 55967-2-I DIVISION ONE UNPUBLISHED FILED: August 7, 2006

COX, J. – "An agency relationship generally arises when two parties consent that one shall act under the control of the other."[1] When an agency relationship exists, the principal is liable for the acts of his or her agent that are committed while the agent is acting within the scope of the agency.[2] A corporation that purchases the assets of another corporation does not, by reason of the purchase alone, become liable for the debts and obligations of the purchased entity.[3] Rather, liability will only arise if one of several exceptions

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[1] Rho Co. v. Dep't of Revenue, 113 Wn.2d 561, 570, 782 P.2d 986 (1989).

[2] Niece v. Elmview Group Home, 131 Wn.2d 39, 48, 929 P.2d 420 (1997).

[3] Hall v. Armstrong Cork, Inc., 103 Wn.2d 258, 261, 692 P.2d 787 (1984).

applies.[4] Here, there is no genuine issue of material fact whether Schroeder U.S.A. Corporation (SUSA) was the agent of Bellevue L.L.C. (Bellevue) at the time of the alleged misrepresentations underlying this action. Likewise, there are no genuine issues of material fact whether Bellevue assumed the liabilities of SUSA. Thus, the summary dismissal of the claims of Optimer International, Inc. against Bellevue was correct. However, Optimer's action was not "on a contract." Thus, the award of attorney fees to Bellevue was incorrect. We affirm in part and reverse in part.

In September 1997, Optimer and SUSA entered into a commercial lease for space in the Bellevue Galleria. Mark Anderson and Peter Bassiri were the representatives of the parties to the lease who negotiated the transaction.

SUSA and Bellevue Partner, L.L.C. formed Bellevue L.L.C. in October 1997, about a month after the execution of the commercial lease. SUSA then assigned its ownership interest in the property on which the Galleria is located together with its interest in the Optimer and other leases to which the Galleria was subject.

Several years later, Optimer commenced this action against Bellevue, asserting fraudulent inducement and negligent misrepresentation claims based on alleged pre-leasing negotiations with SUSA. Bellevue moved for summary judgment on all claims, and the trial court granted its motion. Thereafter, the trial

[4] Id. at 261-62.

court entered judgment and awarded fees and costs totaling $247,328.33 to Bellevue. Optimer moved for reconsideration, which the court denied.

Optimer appeals.

Summary Judgment

Optimer argues that the trial court erred in granting Bellevue's motion for summary judgment on Optimer's fraudulent inducement claim. We disagree.

A motion for summary judgment may be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[5] We review a summary judgment order de novo, viewing the facts and reasonable inferences in the light most favorable to the nonmoving party.[6]

To make a prima facie case for fraud, the plaintiff bears the burden of proving all its nine elements by clear, cogent, and convincing evidence.[7] The elements for fraud are: (1) a representation of an existing fact; (2) that is material; (3) that is false; (4) the speaker has knowledge of its falsity; (5) his intent that it shall be acted upon by the person to whom it is made; (6) ignorance of its falsity on the part of the person to whom it is addressed; (7) the latter's reliance on the

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[5] CR 56(c).

[6] Khung Thi Lam v. Global Med. Sys., 127 Wn. App. 657, 661 n.4, 111 P.3d 1258 (2005).

[7] Beckendorf v. Beckendorf, 76 Wn.2d 457, 462, 457 P.2d 603 (1969).

truth of the representation; (8) reliance is justifiable; and (9) damages.[8] "If [a] promise is made for the purpose of inducing a party to enter into an agreement which he would not otherwise enter into, and with a present intent on the part of the person making the promise not to perform, it is a fraud on which an action can be predicated."[9]

Agency

Optimer argues that Bellevue is liable for SUSA's alleged false representations that induced it to enter into the lease. Specifically, Optimer contends that Bellevue is liable as the principal of SUSA for the latter's alleged pre-leasing misrepresentations relating to the Galleria. We disagree.

An agency relationship arises when two parties expressly or impliedly consent that one shall act under the control of the other.[10] An implied agency is created by the parties' actions, conduct and words.[11] The parties' intent to create an agency relationship is not determinative of whether an implied agency is created.[12] The principal of an agency relationship is liable for the acts of his

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[8] Pedersen v. Bibioff, 64 Wn. App. 710, 723 n.10, 828 P.2d 1113 (1992).

[9] Jacquot v. Farmers Straw Gas Producer Co., 140 Wash. 482, 486-87, 249 P. 984 (1926).

[10] Rho Co., 113 Wn.2d at 570.

[11] Busk v. Hoard, 65 Wn.2d 126, 134, 396 P.2d 171 (1964).

[12] Rho Co., 113 Wn.2d at 570.

or her agent that are committed while the agent is acting within the scope of the agency.[13] Knowledge acquired by an agent is imputed to the principal as a matter of law.[14]

Here, we view the evidence in the light most favorable to the nonmoving party, Optimer. For purposes of review, neither party contests that SUSA made pre-leasing misrepresentations for which it is liable. Moreover, neither party appears to contest that Mark Anderson was the agent of SUSA. We see nothing in the record to support a claim that he also acted as an agent for Bellevue separate from the theories that Optimer presented in opposition to the summary judgment motion. The question is whether Bellevue is also liable for any alleged misrepresentations by SUSA.

Below, in opposition to the motion for summary judgment, Optimer took the position that Bellevue was no stranger to the alleged fraud because Bellevue affirmatively assumed all of SUSA's obligations under the written lease and related assignment. We shall address that claim, which is preserved for appeal, later in this opinion.

On appeal, Optimer expands its argument. We find no persuasive case authority for the proposition that is implicit in the argument that Optimer now makes. That argument is that Bellevue is liable for misrepresentations that

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[13] Niece, 131 Wn.2d at 48.

[14] Hurlbert v. Gordon, 64 Wn. App. 386, 396, 824 P.2d 1238 (1992).

SUSA made before Bellevue existed and at a time when there is no evidence that SUSA was acting for a principal to be formed.

Here, Optimer makes claims of pre-leasing misrepresentations by SUSA. The lease became effective in September 1997. Bellevue was not then in existence, having been formed in October 1997, about a month after the effective date of the lease. While Optimer alludes to term sheets referring to the Galleria as a "first-class" facility, it fails to argue persuasively how that or any other fact supports the view that Bellevue is liable for misrepresentations that SUSA made before the former's existence.

In its reply brief on appeal, Optimer relies on a New York bankruptcy case, Rickel & Associates, Inc. v. Smith.[15] We are not persuaded by that authority that liability exists here for Bellevue.

There, the two defendants, Gregg and Elliot, fraudulently arranged a sale of stock of the bankruptcy debtor for a price much lower than its value.[16] After negotiating the sale, Gregg and Elliot formed Wireless Acquisition Partners, L.L.C. (WAP) to acquire the stock from the debtor. The debtor and others brought an adversary proceeding in the bankruptcy court against WAP and the individuals for securities fraud and common law fraud. The defendants moved

[15] 272 B.R. 74 (Bankr. S.D.N.Y. 2002).

[16] Id. at 81-83.

for summary judgment, which the bankruptcy court denied.

WAP, the corporation formed by the individuals to purchase the stock whose value had been fraudulently lowered in value, argued that it could not be liable under agency theory because the fraud took place before it was incorporated.[17] The bankruptcy court treated Gregg and Elliot as agents of WAP and held WAP liable for the fraud that occurred prior to its incorporation.[18] In doing so, the court relied on an 1890 stock subscription case, reasoning that WAP ratified the fraud by accepting the benefits of the stock sale even though the fraud occurred prior to its legal existence:

> In McDermott v. Harrison, a party entered into a stock subscription agreement with a corporation, based upon the fraudulent statements made by the promoters before the corporation had been created. The court concluded that the shareholder was nevertheless entitled to rescind the subscription agreement. **The corporation became liable by adopting and ratifying the fraudulent acts; it could not retain the benefits of the subscription agreement but repudiate its liability for the fraud committed by those who procured it**. Further, once the tortfeasors became officers of the corporation, their knowledge of the fraud was imputed to the corporation.[19]

Optimer asserts the same principles should apply here. We disagree.

Rickel and McDermott are distinguishable. First, this is not a stock

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[17] Id. at 95.

[18] Id.

[19] Id. (citations omitted) (emphasis added).

subscription case where fraud is perpetuated by agents for an entity to be formed. There is no argument here that there was any discussion at the time of or before the execution of the commercial lease that another entity, Bellevue, was to be formed for the purpose of conducting the business of SUSA. Rather, the record indicates that Optimer entered into the lease transaction with SUSA, no one else.

More importantly, Rickel appears to be a case where WAP participated in the fraudulent acquisition.[20] Here, there are no parallel facts. There is no evidence of Bellevue having participated in the pre-leasing misrepresentations.

In short, we conclude that these two cases are of no assistance here. Optimer has not shown that SUSA was Bellevue's agent for purposes of liability for SUSA's pre-leasing misrepresentations.

Optimer, for the first time in its reply brief cites Poweroil Mfg. Co. v. Carstensen,[21] to argue Bellevue's liability based on ratification. Because Optimer did not preserve this issue below and raised it for the first time in its reply brief, we need not address it.[22]

Assumption of the Lease

[20] Rickel, 272 B.R. at 95.

[21] 69 Wn.2d 673, 419 P.2d 793 (1966).

[22] Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration.").

Optimer also argues that Bellevue is liable for fraudulent inducement because Bellevue assumed all rights and obligations relating to the Galleria and therefore assumed SUSA's tort liability. Specifically, it claims that the lease and related assignments give rise to liability. We disagree.

The general rule in Washington is that where a corporation transfers its assets to another corporation, the transferee is not liable for the debts and liabilities of the transferor unless: "(1) the purchaser expressly or impliedly agrees to assume liability; (2) the purchase is a de facto merger or consolidation; (3) the purchaser is a mere continuation of the seller; or (4) the transfer of assets is for the fraudulent purpose of escaping liability."[23]

Here, Optimer argues that Bellevue is liable for SUSA's false representations under the first of the above exceptions. It argues that Bellevue assumed all of SUSA's "rights, duties and obligations" relating to the Galleria in the (1) Amended Operating Agreement, (2) Assignment and Assumption Agreement, and (3) Assignment of SUSA's Membership Interest in Bellevue.

Optimer's assertion that Bellevue assumed the tort liability of SUSA in the three agreements is misplaced. First, in the Amended and Restated L.L.C. Operating Agreement (Operating Agreement), SUSA assigned to Bellevue the real property on which the Galleria is located and also assigned to Bellevue its

[23] Long v. Home Health Servs., 43 Wn. App. 729, 732, 719 P.2d 176 (1986).

pre-existing and executed leases. This agreement provides that:

> On the Effective Date (i) [SUSA] will assign to the Company [Bellevue L.L.C.] all of its rights under the Purchase and Sale Agreement . . . and the Company [Bellevue] **will assume all of the obligations of [SUSA] under the Purchase and Sale Agreement arising from and after the date of the assignment** . . . .[24]

The Assignment and Assumption Agreement states:

> Assignor, [SUSA] . . . hereby assigns to Bellevue, L.L.C., . . . ("Assignee"), and Assignee **hereby assumes and agrees to perform Assignor's obligations under all contracts, leases, permits, easements and other agreements made or entered into by Assignor** in connection with the real property . . . .[25]

Under the Assignment and Assumption of L.L.C. Membership Interest, SUSA assigned its interest in Bellevue L.L.C. to Bellevue L.L.C. The assignment states:

> Each Assignee hereby accepts the transfer, conveyance and assignment of the Assigned Interest as aforesaid from Assignor, and **assumes all rights, duties and obligations with respect to the applicable portion of the Assigned Interest** accruing with respect to or in respect of the **period from and after the Effective Date**.[26]

Nowhere in these agreements did Bellevue assume SUSA's tort liability. A fair reading of the above provisions is that Bellevue assumed SUSA's contractual obligations with regard to the Purchase and Sale Agreement, but not

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[24] Clerk's Papers at 76, § 4.1.

[25] Clerk's Papers at 169.

[26] Clerk's Papers at 884.

its tort liability. In the Assignment and Assumption Agreement, Bellevue assumed SUSA's contractual obligations with regard to "all contracts, leases, permits, easements and other agreements made or entered into by [SUSA] . . . ." Finally, the Assignment and Assumption concerns SUSA's interest in Bellevue L.L.C., and Optimer fails to point to any part of the assignment that assigns SUSA's tort liability to Bellevue. There simply is no basis to conclude that tort liability was included in the assumption.

Optimer cites Nelson Co. v. Goodrich[27] for the proposition that its "fraud in the inducement claim cannot be defeated by assignment of the contract that was fraudulently induced." Goodrich is inapposite.

In that case, Gustav Larson and his wife entered into an executory contract with the appellant Goodrich to sell him their property.[28] Larson and his wife deeded the property to the respondent Nelson Company and assigned to it the seller's interest in the executory contract.[29] Goodrich defaulted on payments under the contract. Nelson Company gave notice of its election to cancel the contract and brought an action to enforce the forfeiture. Goodrich pled the defense of offset or recoupment based on Larson's alleged misrepresentations about the condition of the property at the time of sale. The supreme court held

[27] 159 Wash. 189, 292 P. 406 (1930).

[28] Goodrich, 159 Wash. at 190.

[29] Id.

that if Goodrich was fraudulently induced to enter into the land sales contract, his cause of action for set off arose immediately, was assigned to Nelson Company, and survived the assignment.[30]

Here, no set off is at issue. Rather, Optimer seeks to establish a fraudulent inducement claim against Bellevue, the assignee of certain obligations of SUSA, which allegedly made the misrepresentations. Thus, this case is of no help to Optimer to establish liability of Bellevue for SUSA's misrepresentations.

Next, Optimer argues that Bellevue is liable for SUSA's misrepresentations because Bellevue is a continuation of SUSA. In its reply brief, Optimer cites Northwest Perfection Tire Co. v. Perfection Tire Corp.,[31] asserting liability of Bellevue because Bellevue is a successor of SUSA. However, Optimer failed to raise this argument before the trial court. Thus, we will not consider it on appeal.[32]

We conclude that Bellevue did not expressly assume SUSA's tort liability

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[30] Id. at 193-94.

[31] 125 Wash. 84, 94, 215 P. 360 (1923) (the successor company completely absorbed and continued the business of the predecessor company, and thus was personally obligated to pay all of the predecessor's debts and obligations existing at the time its business organization and its property were taken over).

[32] RAP 2.5(a); Metcalf v. Metcalf, 57 Wn.2d 612, 616, 358 P.2d 983 (1961).

and Optimer fails to cite any authority that would support holding Bellevue liable. The trial court properly granted summary judgment.

attorney Fees

Optimer argues that the trial court erred in awarding Bellevue attorney fees and costs because Optimer's tort claims were not under the lease. We agree.

In Washington, absent a contract, statute, or recognized ground of equity, the court has no power to award attorney fees as part of the costs of litigation.[33] RCW 4.84.330 provides for reasonable attorney fees and costs to the prevailing party if the action is on a contract or lease which provides for attorney fees and costs.[34] "[A]n action is on a contract for purposes of a contractual attorney fees provision if [(1)] the action arose out of the contract and if [(2)] the contract is central to the dispute."[35] Whether a particular statute or contract authorizes an award of attorney fees is a legal question.[36] We review legal questions de

[33] State ex rel. Macri v. Bremerton, 8 Wn.2d 93, 113, 111 P.2d 612 (1941).

[34] RCW 4.84.330.

[35] Tradewell Group, Inc. v. Mavis, 71 Wn. App. 120, 130, 857 P.2d 1053 (1993).

[36] Id. at 126.

[37] Mountain Park Homeowners Ass'n v. Tydings, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994).

novo.[37]

Here, the trial court concluded that Optimer's tort claims were "fundamentally based on the Lease" and awarded Bellevue attorney fees and costs under RCW 4.84.330. The fee provision in the Bellevue-Optimer lease states:

> In the event of any action or proceeding brought by either party against the other ***under this Lease***, the prevailing party shall be entitled to recover for the fees of its attorneys and other litigation costs incurred in such action or proceeding, including costs of appeal, if any.[38]

Although attorney fees are awardable if a contract provides for them, here Bellevue's attorney fees are not recoverable solely based on the lease because Optimer's tort claims are not "under the lease," as the wording of the lease plainly provides.

Bellevue argues that Optimer's tort actions arose from the lease and it is therefore entitled to attorney fees under RCW 4.84.330. We do not agree.

In Western Stud Welding, Inc. v. Omark Industries, Inc., the court awarded attorney fees to the prevailing party for claims of fraud during negotiations of a stock sale agreement, rescission of the contract, and damages

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[37] Mountain Park Homeowners Ass'n v. Tydings, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994).

[38] (Emphasis added.)

for the decreased value of stock.[39] The court found that these claims were "contract-related allegations" and arose out of the contract.[40] The contract provision in Western Stud provided for attorney fees to the prevailing party "[i]n the event of a dispute between the parties hereto."[41]

In Brown v. Johnson, the court awarded attorney fees to the plaintiff for her misrepresentation claim against the seller because the purchase and sale agreement provided for attorney fees to the prevailing party "concerning this Agreement," and the tort arose from the parties' agreement.[42]

Although the court in Western Stud found that the fraud during contract negotiations was contract-related, that case is distinguishable. There, Quall and Simonseth negotiated the stock sale agreement and Simonseth brought a fraud claim against Quall.[43] Quall was the prevailing party and also a party involved in the negotiations. The fraud claim arose from their negotiations.

Here, SUSA engaged in the fraudulent representations with Optimer, not Bellevue. Optimer's fraudulent inducement claim arose from SUSA's

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[39] 43 Wn. App. 293, 296-99, 716 P.2d 959 (1986).

[40] Id. at 299.

[41] Id. at 297.

[42] 109 Wn. App. 56, 59, 34 P.3d 1233 (2001).

[43] Western Stud, 43 Wn. App. at 294-95.

negotiations with it, not from the Bellevue-Optimer lease. The central dispute in this action is whether Bellevue is liable for SUSA's misrepresentations to Optimer. The Bellevue-Optimer lease does not establish Bellevue's liability for SUSA's torts and that lease is not central to this dispute.

Furthermore, the fee provisions in both Western Stud and Brown are broader than the lease here.[44] The Bellevue-Optimer lease provides attorney fees only for actions or proceedings brought "under this lease." Whereas the contract in Western Stud provided for attorney fees "in the event of a dispute,"[45] and the Brown contract provided for fees "concerning this Agreement."[46] The definition of concern is, "[t]o have to do with or relate to,"[47] which is broader than "under this lease."

We conclude that Optimer's claim for negligent misrepresentation and fraudulent inducement against Bellevue did not arise from the Bellevue-Optimer lease. Rather, it arose from negotiations with SUSA. The Bellevue-Optimer lease and that lease are not central to this dispute. Therefore, fees are not

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[44] The Washington Supreme Court recognized this distinction in Hemenway v. Miller, 116 Wn.2d 725, 742, 807 P.2d 863 (1991) ("We agree with the principle of [Western Stud], but note that the attorney fees provision there was broader than that provision here.").

[45] Western Stud, 43 Wn. App. at 297.

[46] Brown, 109 Wn. App. at 59.

[47] The American Heritage Dictionary of the English Language (3d ed. 1992).

awardable to Bellevue.

Because of our disposition of the case, we need not reach whether the court abused its discretion by denying the CR 59 and 60 motions. Likewise, we need not address whether Optimer received proper notice that it was to provide briefing on the reasonableness of fees before the court's determination on awardability. Likewise, we need not decide whether the amount of fees awarded to Bellevue was reasonable.

We affirm the trial court's order granting summary judgment to Bellevue and reverse the award of attorney fees to Bellevue.

Cox, J.

WE CONCUR:

Becker, J.

Coleman, J.